Mathews-Carlsen Body Works, Inc. *and* Machinists and Aerospace Workers Local Lodge 1414, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 32–CA–15537(E) and 32–CA–l5736(E)

March 31, 1999

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On September 1, 1998, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The Applicant filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application is denied.

Kenneth Ko, Esq., for the General Counsel.
Robert J. Bekken, and *Warren L. Nelson, Esqs. (Fisher & Phillips),* of Newport Beach, California for the Applicant.

SUPPLEMENTAL DECISION

JAY R. POLLACK, Administrative Law Judge. On April 16, 1998, the National Labor Relations Board issued a Decision and Order in the above-captioned case (325 NLRB No. 114) adopting my recommended Order, granting the General Counsel's posttrial motion to withdraw the complaint.

On May 18, 1998, Mathews Carlsen Body Works (the Applicant) filed with the Board in Washington, D.C., an Application for Award of Fees and Expenses, pursuant to the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325 (EAJA) and Section 102.43 of the Board's Rules and Regulations. On, May 18, the Board referred the matter to me for appropriate action. Thereafter, the General Counsel filed a timely answer to the application. The Applicant filed a timely reply.

The gravamen of the General Counsel's argument is that, in the underlying unfair labor practice case, the General Counsel's position was substantially justified.[1]

EAJA provides that an administrative agency award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the government was "substantially justified." In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court held that "substantially justified" means "justified to a degree that could satisfy a reasonable person" or "having a reasonable basis in law and fact."

Concerning the merits of this application, a brief review of the underlying unfair labor practice case is required.

The complaint in this matter alleged that the Applicant violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to apply preexisting contractually based conditions to a substantial number of employees performing bargaining unit work and by unlawfully withdrawing recognition from the Union. In response to these allegations, the Applicant contended that, with the Union's acquiescence, it had historically treated its various contracts with the Union as members-only agreements and, therefore, since a members-only bargaining unit is inappropriate, the legal basis for a Section 8(a)(5) violation was absent. See e.g., *Arthur Sarnow Candy Co*., 306 NLRB 213 (1992).

The hearing was held on March 7 and 10, 1997. Thereafter, on March 19, 1997, the General Counsel filed a motion to withdraw the consolidated complaint based on the record evidence that the Applicant had made contractually required benefit fund payments for only a portion of the employees in the bargaining unit, and that the Union knew or should have known of this prior to the 10(b) period. See *Moeller Bros. Body Shop*, 306 NLRB 191 (1992). The Charging Party-Union opposed withdrawal of the complaint and argued that the Respondent-Employer had concealed the fact that it had treated its collective-bargaining agreement as a members-only agreement, concealed the number of employees and had concealed its misconduct. I issued my decision on May 22, 1997, granting the General Counsel's motion over the Union's objections.

In dismissing the arguments of the Charging Party-Union, and finding no merit to the complaint, I made several credibility resolutions contrary to the evidence presented by the General Counsel's and Union's main witness.

It was not disputed that the Applicant and the Union were party to a series of collective-bargaining agreements covering the Applicant's employees at its body shop in Palo Alto, California. The evidence established that the Union knew that the Applicant hired "sleepers" (employees hired but not reported to the Union or the benefit trust funds) early in the bargaining relationship.

Don Barbe, the current business representative, testified that when he took over the shop from Charles Netherby, Netherby told him that he found a "sleeper" in the shop and cautioned Barbe to "always keep an eye on that place." Glenn Gandolfo who negotiated with the Applicant during the time period at issue herein, testified that he had heard that "there was a problem with sleepers" at the Applicant's shop. I found that the *credible* evidence revealed that early in the relationship, the Applicant directed employees to hide from the Union so that it could have a longer time before having to pay the fringe benefit payments on behalf of new hires. However, for at least 6 years the Applicant did not do so. When the Applicant hired new employees, Marshall Mathews, managing partner, gave the employees the option of joining the Union and receiving union benefits or not joining and receiving health benefits pursuant to the Employer's plan. A majority of the employees chose not to join the Union. The employees did not hide from the union representatives. Two employees testified that they observed Barbe visiting the shop and talking to the union members. One employee testified that Barbe approached him about joining the Union and that he told Barbe that he was not going to join the Union. The employees worked in the shop and wore uniforms identifying themselves as employees of the Applicant. By the time of the hearing, Barbe had not visited the shop for 3 to 3-1/2 years. During the time period that Barbe visited the shop, the Applicant employed 12 employees but only reported 4 employees to the Union.

[1] In view of the disposition of the case, the other issues raised by the General Counsel's answer need not be addressed.

Initially, the General Counsel and the Union contended that the Applicant actively concealed the "sleepers." I found that the *credible* evidence revealed that the Applicant did conceal the sleepers in the 1970s and early 1980s. However, since at least 1989, the Applicant, apparently believing that it only had to make fringe benefit payments on behalf of union members, did not conceal employees from the Union. For example, in 1991 Mathews wrote the pension fund and Barbe seeking reimbursement for pension benefits paid for an employee who was not a union member. Barbe helped Mathews get that reimbursement by writing that the employee was employed by another business owned by Mathews. However, Mathews did not own another business and the employee was, in fact, employed under the Union's collective-bargaining agreement. Mathews did not in any way indicate that the employee was not employed in the bargaining unit. He clearly stated that the employee was not a union member and had not been a member during his employment with the Applicant. Barbe's letter also made mention of an alternative health plan. Thus, I credited Mathews' testimony and did not credit the testimony offered by Barbe, General Counsel's main witness.

Prior to the hearing, the General Counsel contended that the Union enforced the collective-bargaining agreement when it caught sleepers. The *credible* evidence revealed that Barbe visited the shop when a majority of the employees were not complying with the union-security clause and were not covered by the fringe benefit plans. However, Barbe did not take steps to require the Applicant to apply the contract to all the bargaining unit employees. As stated above, Barbe wrote the pension fund in support of Mathews' letter asking for reimbursement of payments made for a nonunion employee. Again, I did not credit the testimony of Barbe offered by the General Counsel.

The Union argued that because the Employer was hiding employees, if it had asked for a list of employees, the Applicant would have provided a list of only union members.[2] I found that for at least 6 years the Applicant did not conceal employees from the Union. Employees wearing uniforms with the Applicant's logo were working in the shop when Barbe visited. Further, Mathews made it clear to Barbe that he did not believe he was required to make fringe benefit contributions on behalf of nonmembers. Again, I could not credit Barbe's testimony on this point.

Barbe testified that he believed that the nonunion employees were employed by another business owned by Mathews. Mathews did not operate another business. He had a storage facility for his privately owned vintage cars. However, that storage area employed no employees. The body shop employees all wore uniforms identifying themselves as employees of the Applicant's body shop. Thus, I found that Barbe and the Union could not reasonably believe that some of the employees were employed by another business entity. This evidence did not become known to the General Counsel until the hearing.

Based on *Moeller Bros. Body Shop,* 306 NLRB 191 (1992), I found that had the Union exercised reasonable diligence, the Union would have become aware that the Applicant had not made fringe benefit payments on behalf of a majority of the employees. Further, the union-security clause had not been applied to a majority of the employees. The Applicant was treating its collective-bargaining agreements as members only agreements. I found no evidence that the Applicant sought to hide its members only treatment of its contracts.

The Union argued that the Applicant concealed its misconduct.[3] I found that the evidence did not support this argument. The evidence showed the Applicant did not conceal the number of employees that it employed. That should have been evident to Barbe on his visits. The size of the operation should have clearly indicated to Barbe that there were more than four or five employees. In fact there were 12. Mathews, apparently believing that he did not have to pay fringe benefits for nonmembers, made no attempt to conceal the fact that he made benefit payments only on behalf of union members. This fact was established by documentary evidence.

Accordingly, as the evidence revealed that *Moeller Bros.* and *Arthur Sarnow Candy* required dismissal of this case, General Counsel properly sought to withdraw the complaint. Therefore, I granted General Counsel's motion. However, as can be seen above, had I credited the witnesses differently, weighed the facts in a different manner, or drawn different inferences from the evidence, I might well have found the Applicant to have violated the Act. Accordingly, I conclude that the General Counsel's position was "substantially justified." See *Galloway School Lines*, 315 NLRB 473 (1993).

Had the Applicant made its witnesses available during the investigation, as it did during the hearing, and if it had made documentary evidence available sooner, it is quite reasonable to believe that complaint might never have issued. The Applicant cannot now rely on its own lack of cooperation to support its application for fees under EAJA. *C. I. Whitten Transfer Co.,* 312 NLRB 28 (1993); *Lion Uniform*, 285 NLRB 249 (1987).

In this case, the General Counsel moved to withdraw the complaint after a review of the record and before the time for the filing of posthearing briefs. I find that the General Counsel acted reasonably in doing so. I, therefore conclude that the General Counsel's position was substantially justified at all stages of the proceeding. *Blaylock Electric*, 319 NLRB 928 (1995), affd. 121 F.3d 1230 (9th Cir. 1997). (General Counsel substantially justified in taking 34 days after close of hearing to withdraw complaint). See also *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1149 (D.C. Cir. 1988.) (The matter should not have gone to the point of preparing posttrial briefs when it should have been clear that the Board's "case" against the company was "wrecked" at trial.)

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

IT IS ORDERED that the application for fees and expenses filed by Mathews-Carlsen Body Works be, and it hereby is dismissed.

[2] The General Counsel did not join in this argument.

[3] The General Counsel abandoned this argument after the hearing.

[4] All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.